

EXHIBIT "A"

ROGER WITKIN
ATTORNEY AT LAW
6 BEACON STREET
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February 11, 2005

Criminal Clerk
Middlesex Superior Court
40 Thorndike Street, 1st Floor
East Cambridge, MA 02141

RE: COMMONWEALTH V. EDWIN SERRANO
NO. 1994 01391

Gentlepeople:

In regard to the above entitled matter enclosed herewith kindly find Motion To Vacate Conviction, Affidavit, Memorandum and Docket Entries.

Would you kindly bring this motion to the attention of the Presiding Justice.

Mr. Serrano is now in federal custody being held at the Essex County Jail in Middleton, Massachusetts.

Thank you.

Very truly yours,

ROGER WITKIN

/slw

encl:

c.c. client
District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, S.S. SUPERIOR COURT
NO. 1994 01391
COMMONWEALTH
V.
EDWIN SERRANO

MOTION TO VACATE CONVICTION

The defendant moves to vacate his conviction on the above numbered indictment because at all times that he appeared In Court, whether it be for arraignment, plea or violation of probation, there was never a Spanish speaking interpreter interpreting what was going on.

Attached hereto please find a copy of the docket entries in the case which do not reflect an interpreter being present, and the defendant's Affidavit. The defendant requests a hearing on this motion.

By his attorney,



ROGER WITKIN
6 Beacon Street,
Suite 1010
Boston, MA 02108
Tel. 617 523 0027
Fax 617 523 2024
BBO No. 531780

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX S.S.

SUPERIOR COURT

NO. 1994 01391

COMMONWEALTH

V.

EDWIN SERRANO

AFFIDAVIT/ DECLARACION JURADA

1. My name is Edwin Serrano.

1. Me llamo Edwin Serrano.

2. I am the defendant in this case.

2. Soy el acusado de este caso.

3. I served the sentence imposed
on this case.

3. Cumplí yo la condena que se
impuso en este caso.

4. There was no Spanish interpreter
in the Court when I was arraigned
on August 19, 1994.

4. En el Tribunal no hubo intérprete al
español cuando me leyeron los
cargos el 19 de agosto de 1994.

5. There was no Spanish interpreter
in the Court when I pleaded
guilty on November 16, 1994.

5. No hubo intérprete al español en
el Tribunal cuando me declaré
culpable el 16 de noviembre de
1994.

6. There was no Spanish interpreter
when I was found in violation of
probation at a Probation Revocation
Hearing on February 7, 1997.

6. No hubo intérprete al español
cuando fallaron que violé la libertad
condicional, en una audiencia
de revocar libertad
condicional, el 7 de febrero de 1997.

7. There was no Spanish interpreter
when I was brought in to Court on
July 10, 2000.

7. No hubo intérprete al español
cuando me llevaron ante el Tribunal
el 10 de Julio de 2000.

8. There was no Spanish interpreter
when I was released on personal
recognizance on November 16,

8. No hubo intérprete al español
cuando me pusieron en libertad
bajo palabra el 16 de noviembre

2000.

9. There was no Spanish interpreter when I appeared on December 30, 2002.

10. There was no Spanish interpreter present on November 13, 2003 for the final Probation Hearing.

Signed this day of 02/02/2005, under the penalties of perjury.

/s/ Edwin Serrano

EDWIN SERRANO

de 2000.

9. No hubo intérprete al español cuando comparecí el 30 de diciembre de 2002.

10. No hubo intérprete al español el 13 de noviembre de 2003, para la audiencia final de libertad condicional.

Firmado este de 02/02/ de 2005 bajo pena de perjurio.

Edwin Serrano
EDWIN SERRANO

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, S.S. SUPERIOR COURT
NO. 1994 01391

COMMONWEALTH
V.
EDWIN SERRANO

**MEMORANDUM OF LAW ON SUPPORT OF
DEFENDANT'S MOTION TO VACATE CONVICTION**

As set out in the defendant's Motion and Affidavit, the defendant a Spanish speaking person was never appointed an interpreter by the Court. A hearing will disclose that the defendant's attorney informally translated for him. The defendant's inability to speak and understand English was apparent to the Court and the actions of defense counsel attempting to both represent the defendant and translate for him was obvious. Well knowing the situation the Court that took no action *sua sponte* to appoint an interpreter

While the Supreme Court has established that it is within the discretion of the Court whether to appoint an interpreter, Perovich v United States, 205 US 86, 91 (1907), it has not found a right to state-provided interpreters to be a constitutional absolute since that issue has never been squarely presented. Lower federal courts have held, however, that if the Court is put on notice that a defendant has a language difficulty, the court must make it unmistakably clear to him that he has the right to have a competent translator assist him, at state expense if he is indigent, throughout the proceeding. United States v Carrion, 488 F2d 12, 15 (1st Cir 1973), cert denied, 416 US 907 (1974); United

States ex rel. Negron v New York, 434 F2d 386, 390-91 (2d Cir 1970). Conversely, if the need for an interpreter's services is not apparent nor are such services requested, it is no abuse of discretion to fail to advise a defendant of their availability. United States v Barrios, 457 F2d 680, 682 (9th Cir 1972).

While the defendant recognizes that no constitutional authority that presently exists in Massachusetts for providing a non-English speaking person the right to an independent interpreter. See Commonwealth v. Alves, 35 Mass. App. Ct. 935, 937 (1993), in this case, the blatant disregard of the defendant's right renders the entire proceedings invalid

In this case the judge abused his discretion under Rule 41, by failing to appoint a certified interpreter, and in so doing, violated the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, to be present and participate in his own defense. See Commonwealth v. Blaikie, 375 Mass. 601, 608 (1978).

Massachusetts Rules of Criminal Procedure, Rule 41 (INTERPRETERS AND EXPERTS) provides in pertinent part:

The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor.

The right of a defendant to be present at trial means the right in the sense of being able to comprehend and participate meaningfully in the proceeding and the requirement that a defendant have "sufficient . . . ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v United States, 362 US 402 (1960). See also Lewis v United States, 146 US 370, 372 (1892) and United States ex rel. Negron v New York, 434 F2d 386 (2d Cir 1970).

The six amendment right to be confronted with adverse witnesses, applicable to the states through the fourteenth amendment, mandate that an interpreter be available to the defendant or witness who cannot effectively communicate. See Pointer v Texas, 380 US 400 (1965). Otherwise, "[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object." United States ex rel. Negron, supra at 389, quoting Note, Incompetency to Stand Trial, 81 HARV L REV 454, 458 (1969).

The Massachusetts Rule of Criminal Procedure, Rule 41 is modeled on the Federal Court Interpreters Act, 28 U.S.C. § 1827 and the federal decisions concerning the application of the rule are instructive. It is well settled that under the Court Interpreters Act "the appointment of an interpreter lies within the sound discretion of the trial judge." United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985) citing United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980). Once the District Court decides to appoint an interpreter, however, it is obligated to follow the mandates of the Court Interpreters Act. Both federal procedure and Massachusetts procedure require a certified interpreter.

In this case when the Court failed to appoint a certified interpreter or to determine whether a certified interpreter was reasonably necessary before proceeding with the defense lawyer as an informal interpreter the court committed plain error. See United States v. Thompson, 289 F.3d 524, 526 (8th Cir. 2002) (citing United States v. Olano, 507 U.S. 725, 732-33, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)). To constitute plain error, a court ruling must be (1) an error, (2) which is plain, i.e., clear

under current law, and (3) which affects the defendant's substantial rights. Thompson, 289 F.3d at 526; United States v. Montanye, 996 F.2d 190, 192 (8th Cir. 1993). It is error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. See Thompson, 289 F.3d at 526 (citing Olano, 507 U.S. at 732).

Here, the Court's failure to appoint a certified interpreter to assist the defendant indeed constitutes plain error. The rule is clear: once a Court determined OR BECAME AWARE OF THE FACT, that the defendant was in need of an interpreter, the Court should not have proceeded with the assistance of the defense attorney but rather it was obligated to use a certified interpreter. See United States v. Paz, 981 F.2d 199, 200 (5th Cir. 1992). The certification requirement is intended to provide a procedural safeguard for non-native English speaking defendants during legal proceedings. Paz, 981 F.2d at 200 ("The certification process serves as a safeguard to guarantee that the Court interpreter is competent."); United States v. Huang, 960 F.2d 1128, 1135 (2d Cir. 1992) ("Implicit in [the qualification] requirement is the notion that the interpreter should be competent to render accurate translations." [Quoting United States v. Villegas, 899 F.2d 1324, 1348 (2d Cir. 1990)]).

The principle purpose of Rule 41 and the CIA is "to ensure that the defendant can comprehend the proceedings . . . " through the appointment of a certified interpreter. United States v. Febus, 218 F.3d 784, 791 (7th Cir. 2000).

Judges are entrusted with great discretion because defendants do not have an automatic right to an interpreter under Rule 41 as in its Federal counterpart the Federal Court Interpreters Act. A defendant is only entitled to the appointment of an interpreter

if the Court determines that the defendant: (1) speaks only or primarily a language other than the English language; and (2) this fact inhibits their comprehension of the proceedings or communication with counsel. In making this determination, at Court must evaluate a variety of factors, including defendant's knowledge of English and the complexity of the proceedings and testimony. Courts have a duty to evaluate these factors when put on notice that the defendant speaks only or primarily a language other than English. See e.g., 28 U.S.C. § 1827(d)(1).

Courts may be put on notice by motion of the parties, or, as in this case, by the Court's own recognition, when it is clear that the defendant's communication with the Court or counsel is inhibited by language. Once a Court is on notice, it has a duty to inquire as to whether the fact that the defendant speaks only or primarily a language other than English inhibits his or her ability to comprehend the proceedings and communicate with counsel. See United States v. Rosa, 946 F.2d 505, 508 (7th Cir. 1991) [citing United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir. 1988)].

The United States Supreme Court has yet to recognize the right to a court-appointed interpreter as a constitutional one. But, in 1907, the Supreme Court stated: "One [claim] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of discretion." Perovich v. United States, 205 U.S. 86, 91, 51 L. Ed. 722, 27 S. Ct. 456 (1907). It was not until 1970 that a circuit court held that an indigent criminal defendant

who could not speak or understand English was constitutionally entitled to an interpreter. See Negron v. New York, 434 F.2d 386, 387 (2d Cir. 1970).

In United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985), the Court held that "a defendant in a criminal proceeding is denied due process when: (1) what is told to him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to [the defendant] in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact."

Cases from various circuits have since also recognized such a constitutional right which are compiled in United States v. Mayans, 17 F.3d 1174, 1179-81 (9th Cir. 1994) (holding that the defendant's Fifth Amendment rights were violated when interpreter withdrawn by court); see also United States v. Carrion, 488 F.2d 12, 14-15 (9th 1973).

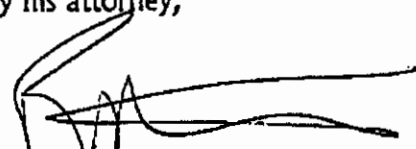
CONCLUSION

In this case upon becoming aware of the fact that the defendant did not speak English and that his attorney was translating for him, the Court, *sua sponte*, was obliged both by Rule 41 and the defendant's Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights.

Respectfully submitted, \

EDWIN SERRANO

By his attorney,



ROGER WITKIN
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Suite 1010
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BBO No. 531780

MAS-20040909

**Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket**

11/29/2004

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**MICR1994-01391
Commonwealth v Serrano, Edwin**

File Date	08/04/1994	Status	Suspended (default warrant) (suwar)
Status Date	01/29/2004	Session	1 - Crim 1 (8B Cambridge)
Jury Trial	Unknown	Origin	1 - Indictment
Lead Case			

Arraignment	08/19/1994	Track		Final PTC	
Disp. Deadline	08/19/1995	Deadline Status	Deadline active since return date	Status Date	08/22/1994
Pro Se Deft	No	Custody Status		Start Date	
Weapon		Substance		Prior Record	Unknown

OFFENSES

Num	Offense	Code	Status	Status Date
1	06/11/1994 Assault, intent to rape	265:024.1	Guilty plea	11/16/1994
2	06/11/1994 Robbery, unarmed	265:019:b	Guilty plea	11/16/1994
3	06/11/1994 Indecent assault & battery on person 14 or over	265:013H	Guilty plea	11/16/1994
4	06/11/1994 Threat(s)	275:002	Guilty plea	11/16/1994
5	06/11/1994 Controlled substnc, possess	094C:034.1	Guilty plea	11/16/1994

PARTIES

Defendant
Edwin Serrano
DOB: 02/10/1978
Gender: Male
Active 08/04/1994

Private Counsel 548038
Richard P Howe Jr
11 Kearney Square
Lowell, MA 01852
Phone: 978-454-9167
Fax: 978-453-4419
Withdrawn 07/10/2000

Private Counsel 556389
Debra D DeWitt
Ahern & DeWitt
200 Central Street
Lowell, MA 01852
Phone: 978-970-2989
Fax: 978-970-2633
Inactive 12/30/2002

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Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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MICR1994-01391
Commonwealth v Serrano, Edwin

Plaintiff Commonwealth Gender: Unknown Active 08/04/1994	Private Counsel 552751 Stephen J Wright 335 Common Street Lawrence, MA 01840 Phone: 978-685-3377 Fax: 978-687-8328 Active 12/30/2002 Notify District Atty's Office 559563 Alison M Takacs Middlesex County District Atty's Office 40 Thorndike Street East Cambridge, MA 02141 Phone: 617-494-4050 Fax: 617-225-0871 Active 08/19/1994 Notify
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ENTRIES

Date	Paper	Text
08/04/1994	1.0	Indictment returned
08/16/1994		Continued until 08/19/94 for arraignment on all matters.
08/19/1994	2.0	Appointment of Counsel Howe, Jr.
08/19/1994		Appearance of Deft's Atty: Howe Jr
08/19/1994		Appearance of Commonwealth's Atty: Takacs
08/19/1994		Deft arraigned before Court
08/19/1994		RE offense 1: Plea of not guilty
08/19/1994		RE offense 2: Plea of not guilty
08/19/1994		RE offense 3: Plea of not guilty
08/19/1994		RE offense 4: Plea of not guilty
08/19/1994		RE offense 5: Plea of not guilty
08/19/1994		Bail set: \$20,000.00 with surety or \$2,000.00 cash (Martha B Sosman, Justice) Mittimus Issued not recognizing.
08/19/1994		Continued until 09/09/94 for pre-trial conference on all matters.
08/19/1994	3.0	Mittimus not recognizing indictments returned with service.
08/19/1994		Deft notified of right to request drug exam
09/09/1994	4.0	Pre-trial conference report, Filed in Court.
09/09/1994		Continued until 09/27/94 for motions on all matters.
09/27/1994		Continued until 10/17/94 for assignment of a trial date on all matters.
09/29/1994	5.0	Commonwealth's Notice of Discovery, Filed in Court.
10/21/1994		Continued until 11/16/94 for an assignment of a trial date by agreement on all matters.
11/16/1994		Plea of not guilty changed to guilty; accepted (Charles J Hely, Justice) Commonwealth moves for sentence.
11/16/1994		RE offense 1: Guilty plea
11/16/1994		RE offense 2: Guilty plea
11/16/1994		RE offense 3: Guilty plea

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Date	Paper	Text
11/16/1994		RE offense 4: Guilty plea
11/16/1994		RE offense 5: Guilty plea
11/16/1994		Sentence Imposed: 001-M.C.I., Cedar Junction for a term not exceeding Seven Years, or less than Five Years. This sentence to take effect from and after expiration of the sentence imposed this day in #94-1151-005. Sentence suspended for three years. Deft as principal and J Burke as surety recog in \$100 and on Three Years Probation Terms: (1) No Contact, Employment Or School (2) Evaluation for Drug Abuse (Charles J Hely, Justice)
11/16/1994		Sentence imposed: 002 - MASSACHUSETTS CORRECTIONAL INSTITUTION, CEDAR JUNCTION FOR A TERM NOT EXCEEDING....SEVEN....YEARS, OR LESS THAN....FIVE.....YEARS. This sentence to be served concurrently with the sentence imposed this day in #94-1391-001. Sentence suspended for three years. Defendant as principal and J. Burke as surety recognizing in \$100.00 and on three years probation. (see #94-1391-001. By the Court, Charles J. Hely, Justice.
11/16/1994		Sentence imposed: 003 - MASSACHUSETTS CORRECTIONAL INSTITUTION, CEDAR JUNCTION FOR A TERM NOT EXCEEDING....SEVEN...YEARS, OR LESS THAN....FIVE....YEARS. This sentence to be served concurrently with the sentence imposed this day in #94-1391-001. By the Court, Charles J. Hely, Justice.
11/16/1994		Sentence imposed: 004 - ON FILE BY ORDER OF C. HELY, J., DEFENDANT NOT OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE.
11/16/1994		Sentence imposed: 005 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE.
11/21/1994		Abstract mailed to the Bureau of Criminal Information.
10/23/1996	6.0	Attorney's Motion to Withdraw, Filed in Court.
02/05/1997	7.0	Habeas corpus for Deft at Essex Correctional Facility (Middleton)
02/07/1997		AFTER HEARING, DEFENDANT IS FOUND IN VIOLATION OF PROBATION AND IS SURRENDERED.
02/07/1997		Sentence imposed: 001 - THE SUSPENDED PORTION OF THE SENTENCE IMPOSED ON NOVEMBER 16, 1997 IS THIS DAY IN FULL FORCE AND EFFECT - FORTHWITH. MITTS ISSUED. THE DEFENDANT IS FURTHER ORDERED TO BE PLACED ON PROBATION FOR A PERIOD OF THREE YEARS (J. BURKE AS SURETY) TO BE SERVED FROM AND AFTER THE ABOVE IMPOSED SENTENCE. BY THE COURT, (BALL, J.)
02/07/1997		Sentence imposed: 002 - MASSACHUSETTS CORRECTIONAL INSTITUTION, CEDAR JUNCTION FOR A TERM NOT EXCEEDING....SEVEN YEARS.... OR LESS THAN.... FIVE YEARS..... THREE YEARS TO BE SERVED. This sentence to be served concurrently with the sentence imposed this day in #94-1391-01. By the Court, (Ball, J.)
02/07/1997		Sentence imposed: 003 - MASSACHUSETTS CORRECTIONAL INSTITUTION, CEDAR JUNCTION FOR A TERM NOT EXCEEDING.... SEVEN YEARS..... OR LESS THAN.... FIVE YEARS..... THREE YEARS TO BE SERVED FORTHWITH. MITTS ISSUED. This sentence to be served concurrently with the sentence imposed this day in #94-1391-01. By the Court, (Ball, J.)

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Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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MICR1994-01391
Commonwealth v Serrano, Edwin

Date	Paper	Text
02/07/1997		Notified of right of appeal under Rule 64 "Appeal Court"
02/07/1997		Mittimus issued on indictments 001, 002, and 003 issued to MCI Cedar Junction
02/07/1997	8.0	Mittimus on indictment 001,002 and 003 returned with service
02/18/1997		Letter from Dept of Corrections regarding sentence
07/01/1997		Amended Mittimus issued to MCI Cedar Junction
07/01/1997		003 - THE SENTENCE IMPOSED ON NOVEMBER 16, 1994 IS THIS DAY AMENDED TO READ: FOUR (4) TO FIVE (5) YEARS AT CEDAR JUNCTION. MITTS ISSUED BY THE COURT, (Hely, J.)
06/06/2000		Defendant defaulted; warrant to issue
06/06/2000		Warrant was entered onto the Warrant Management System 06/06/2000
07/10/2000	9.0	Appointment of Counsel Debra D DeWitt
07/10/2000		Appearance of Deft's Atty: Debra D DeWitt
07/10/2000		Default removed; warrant recalled
07/10/2000		Bail set: \$50,000 surety or \$5,000 cash (Hely, J)
07/10/2000		Mittimus issued not recog. Indictments
07/10/2000		Bail warning read in open court
07/10/2000		Continued until 7/27/00 for status
07/10/2000		Reporter present: Virginia Karas
07/24/2000	10.0	Mittimus Not Recog. - Indictments returned with service
11/16/2000		Bail set on 7/10/00 revoked
11/16/2000		Deft released on personal recognizance (Fabricant, J)
11/16/2000		Probation continued to original date 12/3/2002
11/16/2000		Reporter present: Virginia Karas
01/25/2001	11.0	Probation warrant issued
12/26/2002	12.0	Habeas corpus for Deft at Middlesex County Jail (Cambridge) for Monday, December 30, 2002.
12/30/2002		VTP warrant recalled
12/30/2002		Appearance of Deft's Atty: Stephen J Wright
12/30/2002		Bail set: \$20,000 surety or \$2,000 cash (Locke, J)
12/30/2002		Mittimus issued
12/30/2002		Continued until 2/14/03 for final surrender in 6B at request of both sides
12/30/2002		Conditions Of Bail: If bail is made deft is to report to probation. Remain employed. Stay at same residence with girlfriend (Locke, J)
12/30/2002	13.0	Mittimus (001) not recog. indictments returned with service
01/03/2003		Habeas corpus for Deft at Camb. Jail 02-14-02
01/06/2003	14.0	Bail satisfied: \$2000.00 Cash Red # 9985 Surety: Defendant
02/19/2003	15.0	Clerks Minutes on Probation Hearing (Garsh, Judge, presiding) P.O. Craig O'Leary Result: Continued to 04/11/03 Assistant Clerk Daniel H Doherty
04/11/2003	16.0	Clerks Minutes On Probation Hearing (Bail, Judge presiding) Result: Off list-request of Probation Assistant Clerk Matt. Day
04/11/2003		Reporter present: Leary, Mary
05/29/2003	17.0	Clerks Minutes on probation Hearing (Hines, judge, presiding) continued to 07/11/03 for final surrender Assistant Clerk Matt. Day

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Date	Paper	Text
05/29/2003		Reporter present: Lynch, Jr., John M.
07/11/2003	18.0	Clerk's Minutes on Probation Hearing: (Pasquale,CM) Presiding PO Craig O'Leary off the list by agreement
07/11/2003		Reporter present: Lynch, Jr., John M.
08/19/2003	19.0	Clerk's Minutes on Probation Hearing: (Agnes,J) Presiding PO Craig O'Leary PO Reports case scheduled for 9-19-03 for final surrender at 2 pm
08/19/2003		Reporter present: Jacques, Robert
09/19/2003	20.0	Clerks Minutes on Probation Hearing Pasquale J., Presiding--Probation Officer C. O'Leary--Result Off List No Judge Available. (Court Reporter John Lynch (MD/AC)
11/13/2003	21.0	Clerks Minutes on Probation Hearing Chernoff, J. Presiding--Probation Officer C. O'Leary--Defendant Attorney Stephen Wright--Final Surrender Hearing--Result: Violation of probation found. Additional condition (1) Report every other week in person with job & residential verification. (2) Random Urine Screening.--Continued to 1/29/04 (MAC)
11/13/2003		Continued until January 29, 2004
11/13/2003		Reporter present: Welch, Maureen
01/29/2004		Defendant defaulted; warrant to issue
01/29/2004		Warrant was entered onto the Warrant Management System January 29, 2004

EVENTS

Date	Session	Event	Result
08/16/1994	Crim 6 (Lowell)	Arraignment	
		Habe issued.	
08/19/1994	Crim 6 (Lowell)	Arraignment	Event held as scheduled
		Habe issued.	
09/09/1994	Crim 6 (Lowell)	Conference: Pre-Trial	Event held as scheduled
		Habe issued.	
09/27/1994	Crim 6 (Lowell)	Hearing: Motion	Event held as scheduled
		Habe issued.	
10/17/1994	Crim 6 (Lowell)	Conference: Trial Assignment	
10/20/1994	Crim 6 (Lowell)	TRIAL: by jury	
		Habe issued 10/17	
11/16/1994	Crim 6 (Lowell)	TRIAL: by jury	
11/16/1994	Crim 6 (Lowell)	Hearing: Plea Change	Event held as scheduled
		Habe issued 10/24	
02/07/1997	Crim 6 (Lowell)	Hearing: Probation Surrender	Event held as scheduled
		Habe issued 2/5/97	
03/30/2000	Crim 6 (Lowell)	Hearing: Probation Report	Event canceled not re-scheduled
		Assignment of Counsel	
06/06/2000	Crim 6 (Lowell)	Hearing: Probation Report	Defendant did not appear/default
		appt of counsel	
07/10/2000	Crim 6 (Lowell)	Hearing: Misc Matters	Event held as scheduled
		Habe cancelled for 7/7, rescheduled for 7/10 for Default removal	
10/06/2000	Crim 6 (Lowell)	Hearing: Probation Report	Event not held--scheduled for another date
		Habe issued to Camb. Jail	
11/06/2000	Crim 6 (Lowell)	Hearing: Probation Surrender	Event not held--scheduled for another date
		Habe issued to Camb	

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Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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11/29/2004

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MICR1994-01391
Commonwealth v Serrano, Edwin

Date	Session	Event	Result
11/16/2000	Crim 6 (Lowell)	Hearing: Probation Report Habe issued to Camb	Event held as scheduled
01/25/2001	Crim 6 (Lowell)	Hearing: Probation Report appt of counsel; PO Craig O'Leary; 2pm	Defendant did not appear/default
12/30/2002	Crim 6 (Lowell)	Hearing: Probation Report HABE ISSUED TO CAMBRIDGE.	Event held as scheduled
02/14/2003	Crim 1 (6B Cambridge)	Hearing: Probation Report PO O'Leary	Event held as scheduled
04/11/2003	Crim 1 (6B Cambridge)	Hearing: Probation Report P.O. Craig O' Leary	Event not held--joint request
05/29/2003	Crim 1 (6B Cambridge)	Hearing: Probation Report P.O. Craig O'Leary	Event held as scheduled
07/11/2003	Crim 1 (6B Cambridge)	Hearing: Probation Surrender P.O. Craig O'Leary	Event not held--req of Defendant
08/19/2003	Crim 1 (6B Cambridge)	Hearing: Probation Surrender P.O. Craig O'Leary	Event not held--req of Defendant
09/19/2003	Crim 1 (6B Cambridge)	Hearing: Probation Surrender P.O. Craig O' Leary	Event not held--req of Commonwealth
11/13/2003	Crim 1 (6B Cambridge)	Hearing: Probation Surrender	Event held as scheduled
01/29/2004	Crim 1 (6B Cambridge)	Hearing: Probation Report PO O'Leary	Defendant did not appear/default

BAIL

Bail Type	Cash
Bail Amount	\$2,000.00
Bail Status	Satisfied
Status Date	01/06/2003

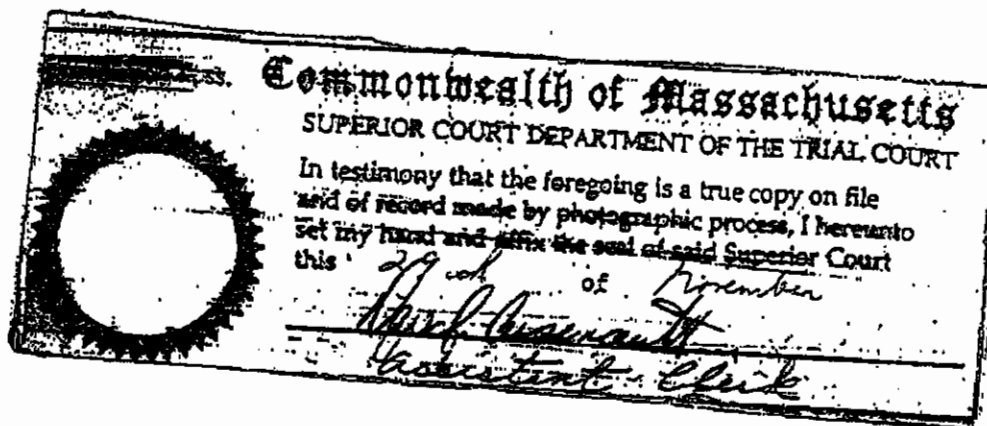


EXHIBIT "B"

ROGER WITKIN
ATTORNEY AT LAW
6 BEACON STREET
BOSTON, MASSACHUSETTS 02108

TEL (617) 523-0027
FAX (617) 523-2024

February 11, 2005

Criminal Clerk
Middlesex Superior Court
40 Thorndike Street, 1st Floor
East Cambridge, MA 02141

RE: COMMONWEALTH V. EDWIN SERRANO
NO. 1994 01511

Gentlepeople:

In regard to the above entitled matter enclosed herewith kindly find Motion To Vacate Conviction, Affidavit, Memorandum and Docket Entries.

Would you kindly bring this motion to the attention of the Presiding Justice.

Mr. Serrano is now in federal custody being held at the Essex County Jail in Middleton, Massachusetts.

Thank you.

Very truly yours,

ROGER WITKIN

/slw

encs.

c.c. client
District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, S.S.

SUPERIOR COURT
NO. 1994 01511

COMMONWEALTH

V.

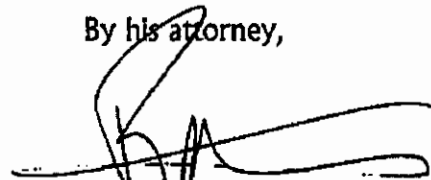
EDWIN SERRANO

MOTION TO VACATE CONVICTION

The defendant moves to vacate his conviction on the above numbered indictment because at all times that he appeared in Court, whether it be for arraignment, plea or violation of probation, there was never a Spanish speaking interpreter interpreting what was going on.

Attached hereto please find a copy of the docket entries in the case which do not reflect an interpreter being present, and the defendant's Affidavit. The defendant requests a hearing on this motion.

By his attorney,



ROGER WITKIN
6 Beacon Street,
Suite 1010
Boston, MA 02108
Tel. 617 523 0027
Fax 617 523 2024
BBO No. 531780

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, S.S.

SUPERIOR COURT

NO. 1994 01511

COMMONWEALTH

V.

EDWIN SERRANO

AFFIDAVIT/DECLARACION JURADA

1. My name is Edwin Serrano.

1. Me llamo Edwin Serrano.

2. I am the defendant in this case.

2. Soy el acusado de este caso.

3. There was no Spanish interpreter in the Court when I was arraigned cargos

3. No hubo intérprete al español en el Tribunal cuando me leyeron los

on September 9, 1994.

el 9 de septiembre de 1994.

4. There was no Spanish interpreter in the Court when I pleaded guilty on November 16, 1994.

4. No hubo intérprete al español en el Tribunal cuando me declaré culpable el 16 de noviembre de 1994.

Signed this day of 02/02/2005,
under the penalties of perjury.

Firmado este de de 02/02/2005
bajo pena de perjurio

/s/ Edwin Serrano

Edwin Serrano

EDWIN SERRANO

EDWIN SERRANO

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, S.S.

SUPERIOR COURT
NO. 1994 01511

COMMONWEALTH

V.

EDWIN SERRANO

**MEMORANDUM OF LAW ON SUPPORT OF
DEFENDANT'S MOTION TO VACATE CONVICTION**

As set out in the defendant's Motion and Affidavit, the defendant a Spanish speaking person was never appointed an interpreter by the Court. A hearing will disclose that the defendant's attorney informally translated for him. The defendant's inability to speak and understand English was apparent to the Court and the actions of defense counsel attempting to both represent the defendant and translate for him was obvious. Well knowing the situation the Court that took no action *sua sponte* to appoint an interpreter

While the Supreme Court has established that it is within the discretion of the Court whether to appoint an interpreter, Perovich v United States, 205 US 86, 91 (1907), it has not found a right to state-provided interpreters to be a constitutional absolute since that issue has never been squarely presented. Lower federal courts have held, however, that if the Court is put on notice that a defendant has a language difficulty, the court must make it unmistakably clear to him that he has the right to have a competent translator assist him, at state expense if he is indigent, throughout the proceeding. United States v Carrion, 488 F2d 12, 15 (1st Cir 1973), cert denied, 416 US 907 (1974); United

States ex rel. Negron v New York, 434 F2d 386, 390-91 (2d Cir 1970). Conversely, if the need for an interpreter's services is not apparent nor are such services requested, it is no abuse of discretion to fail to advise a defendant of their availability. United States v Barrios, 457 F2d 680, 682 (9th Cir 1972).

While the defendant recognizes that no constitutional authority that presently exists in Massachusetts for providing a non-English speaking person the right to an independent interpreter. See Commonwealth v. Alves, 35 Mass. App. Ct. 935, 937 (1993), in this case, the blatant disregard of the defendant's right renders the entire proceedings invalid

In this case the judge abused his discretion under Rule 41, by failing to appoint a certified interpreter, and in so doing, violated the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, to be present and participate in his own defense. See Commonwealth v. Blaikie, 375 Mass. 601, 608 (1978).

Massachusetts Rules of Criminal Procedure, Rule 41 (INTERPRETERS AND EXPERTS) provides in pertinent part:

The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor.

The right of a defendant to be present at trial means the right in the sense of being able to comprehend and participate meaningfully in the proceeding and the requirement that a defendant have "sufficient . . . ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v United States, 362 US 402 (1960). See also Lewis v United States, 146 US 370, 372 (1892) and United States ex rel. Negron v New York, 434 F2d 386 (2d Cir 1970).

The six amendment right to be confronted with adverse witnesses, applicable to the states through the fourteenth amendment, mandate that an interpreter be available to the defendant or witness who cannot effectively communicate. See Pointer v Texas, 380 US 400 (1965). Otherwise, "[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object." United States ex rel. Negron, supra at 389, quoting Note, Incompetency to Stand Trial, 81 HARV L REV 454, 458 (1969).

The Massachusetts Rule of Criminal Procedure, Rule 41 is modeled on the Federal Court Interpreters Act , 28 U.S.C. § 1827 and the federal decisions concerning the application of the rule are instructive. It is well settled that under the Court Interpreters Act "the appointment of an interpreter lies within the sound discretion of the trial judge." United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985) citing United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980). Once the District Court decides to appoint an interpreter, however, it is obligated to follow the mandates of the Court Interpreters Act. Both federal procedure and Massachusetts procedure require a certified interpreter.

In this case when the Court failed to appoint a certified interpreter or to determine whether a certified interpreter was reasonably necessary before proceeding with the defense lawyer as an informal interpreter the court committed plain error. See United States v. Thompson, 289 F.3d 524, 526 (8th Cir. 2002) (citing United States v. Olano, 507 U.S. 725, 732-33, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)). To constitute plain error, a court ruling must be (1) an error, (2) which is plain, i.e., clear

under current law, and (3) which affects the defendant's substantial rights. Thompson, 289 F.3d at 526; United States v. Montanye, 996 F.2d 190, 192 (8th Cir. 1993). It is error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. See Thompson, 289 F.3d at 526 (citing Olano, 507 U.S. at 732).

Here, the Court's failure to appoint a certified interpreter to assist the defendant indeed constitutes plain error. The rule is clear: once a Court determined OR BECAME AWARE OF THE FACT, that the defendant was in need of an interpreter, the Court should not have proceeded with the assistance of the defense attorney but rather it was obligated to use a certified interpreter. See United States v. Paz, 981 F.2d 199, 200 (5th Cir. 1992). The certification requirement is intended to provide a procedural safeguard for non-native English speaking defendants during legal proceedings. Paz, 981 F.2d at 200 ("The certification process serves as a safeguard to guarantee that the Court interpreter is competent."); United States v. Huang, 960 F.2d 1128, 1135 (2d Cir. 1992) ("Implicit in [the qualification] requirement is the notion that the interpreter should be competent to render accurate translations." [Quoting United States v. Villegas, 899 F.2d 1324, 1348 (2d Cir. 1990)]).

The principle purpose of Rule 41 and the CIA is "to ensure that the defendant can comprehend the proceedings . . . " through the appointment of a certified interpreter. United States v. Febus, 218 F.3d 784, 791 (7th Cir. 2000).

Judges are entrusted with great discretion because defendants do not have an automatic right to an interpreter under Rule 41 as in its Federal counterpart the Federal Court Interpreters Act. A defendant is only entitled to the appointment of an interpreter

if the Court determines that the defendant: (1) speaks only or primarily a language other than the English language; and (2) this fact inhibits their comprehension of the proceedings or communication with counsel. In making this determination, the Court must evaluate a variety of factors, including defendant's knowledge of English and the complexity of the proceedings and testimony. Courts have a duty to evaluate these factors when put on notice that the defendant speaks only or primarily a language other than English. See e.g., 28 U.S.C. § 1827(d)(1).

Courts may be put on notice by motion of the parties, or, as in this case, by the Court's own recognition, when it is clear that the defendant's communication with the Court or counsel is inhibited by language. Once a Court is on notice, it has a duty to inquire as to whether the fact that the defendant speaks only or primarily a language other than English inhibits his or her ability to comprehend the proceedings and communicate with counsel. See United States v. Rosa, 946 F.2d 505, 508 (7th Cir. 1991) [citing United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir. 1988)].

The United States Supreme Court has yet to recognize the right to a court-appointed interpreter as a constitutional one. But, in 1907, the Supreme Court stated: "One [claim] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of discretion." Perovich v. United States, 205 U.S. 86, 91, 51 L. Ed. 722, 27 S. Ct. 456 (1907). It was not until 1970 that a circuit court held that an indigent criminal defendant

who could not speak or understand English was constitutionally entitled to an interpreter. See Negron v. New York, 434 F.2d 386, 387 (2d Cir. 1970).

In United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985), the Court held that "a defendant in a criminal proceeding is denied due process when: (1) what is told to him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to [the defendant] in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact.".

Cases from various circuits have since also recognized such a constitutional right which are compiled in United States v. Mayans, 17 F.3d 1174, 1179-81 (9th Cir. 1994) (holding that the defendant's Fifth Amendment rights were violated when interpreter withdrawn by court); see also United States v. Carrion, 488 F.2d 12, 14-15 (9th 1973).

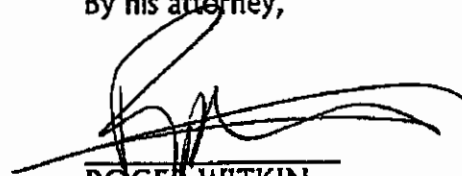
CONCLUSION

In this case upon becoming aware of the fact that the defendant did not speak English and that his attorney was translating for him, the Court, *sua sponte*, was obliged both by Rule 41 and the defendant's Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights.

Respectfully submitted,

EDWIN SERRANO

By his attorney,

A handwritten signature in black ink, appearing to be 'Roger Witkin', written over a horizontal line.

ROGER WITKIN
6 Beacon Street,
Suite 1010
Boston, MA 02108
Tel: 617 523 0027
Fax 617 523 2024
BBO No. 531780

MAS-20040909

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket

11/29/2004
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MICR1994-01511
Commonwealth v Serrano, Edwin

File Date	08/17/1994	Status	Disposed (sentenced) (dsenlmp)
Status Date	11/16/1994	Session	6 - Crim 6 (Lowell)
Jury Trial	Unknown	Origin	1 - Indictment
Lead Case			

Arraignment	09/09/1994	Track		Final PTC	
Disp. Deadline	09/09/1995	Deadline Status	Deadline active since return date	Status Date	09/12/1994
Pro Se Deft	No	Custody Status		Start Date	
Weapon		Substance		Prior Record	Unknown

OFFENSES				
Num	Offense	Code	Status	Status Date
1	01/13/1994 Assault, dangerous weapon	265:015B:b	Guilty plea	11/16/1994
2	01/13/1994 Assault, dangerous weapon	265:015B:b	Guilty plea	11/16/1994
3	01/13/1994 Assault, dangerous weapon	265:015B:b	Guilty plea	11/16/1994
4	01/13/1994 Assault, dangerous weapon	265:015B:b	Guilty plea	11/16/1994
5	01/13/1994 Dang weapon, possess gun, no license, on person/in MV	269:010:a	Guilty plea	11/16/1994
6	01/13/1994 Dang weapon, possess/transfr gun/ammo, no ID card	269:010:h.1	Guilty plea	11/16/1994
7	01/13/1994 Remove/mutilate firearm serial#, receive such firearm	269:011C	Guilty plea	11/16/1994
8	12/08/1993 Class B substnc, phencyclidine/cocaine, distrib/manufac	094C:032A:c	Guilty plea	11/16/1994

PARTIES	
Defendant Edwin Serrano Gender: Male Active 08/17/1994 Plaintiff Commonwealth Gender: Unknown Active 08/17/1994	Private Counsel 548038 Richard P Howe Jr 11 Kearney Square Lowell, MA 01852 Phone: 978-454-9167 Fax: 978-453-4419 Active 09/09/1994 Notify District Atty's Office 559563 Allison M Takacs Middlesex County District Atty's Office 40 Thorndike Street East Cambridge, MA 02141 Phone: 617-494-4050 Fax: 617-225-0871 Active 09/09/1994 Notify

MAS-20040909

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket

11/29/2004
01:08 PM

MICR1994-01511
Commonwealth v Serrano, Edwin

Alias deft name
Edwin Maldonado
Gender: Male
Alias (see real party's status) 08/17/1994

ENTRIES

Date	Paper	Text
08/17/1994	1.0	Indictment returned
09/09/1994		Appearance of Commonwealth's Atty: Takacs
09/09/1994	2.0	Appointment of Counsel Howe Jr #0792892-2
09/09/1994		Appearance of Deft's Atty: Howe Jr
09/09/1994		Deft arraigned before Court
09/09/1994		RE offense 1: Plea of not guilty
09/09/1994		RE offense 2: Plea of not guilty
09/09/1994		RE offense 3: Plea of not guilty
09/09/1994		RE offense 4: Plea of not guilty
09/09/1994		RE offense 5: Plea of not guilty
09/09/1994		RE offense 6: Plea of not guilty
09/09/1994		RE offense 7: Plea of not guilty
09/09/1994		RE offense 8: Plea of not guilty
09/09/1994		Bail set: \$50,000.00 with surety or \$5,000.00 cash (Charles J Hely, Justice) Mittimus issued not recognizing.
09/09/1994		09/27/94 for motions on all matters.
09/09/1994	3.0	Mittimus not recognizing indictments returned with service endorsed thereon.
09/27/1994	4.0	Pre-trial conference report, Filed in Court.
09/27/1994		Continued until 10/17/94 for assignment of a trial date on all matters.
09/29/1994	5.0	Commonwealth's Notice of Discovery, Filed in Court.
11/16/1994		Plea of not guilty changed to guilty; accepted (Charles J Hely, Justice) Commonwealth moves for sentence.
11/16/1994		RE offense 1: Guilty plea
11/16/1994		RE offense 2: Guilty plea
11/16/1994		RE offense 3: Guilty plea
11/16/1994		RE offense 4: Guilty plea
11/16/1994		RE offense 5: Guilty plea
11/16/1994		RE offense 6: Guilty plea
11/16/1994		RE offense 7: Guilty plea
11/16/1994		RE offense 8: Guilty plea
11/16/1994		Sentence imposed: 001 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE.
11/16/1994		Sentence imposed: 002 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE.
11/16/1994		Sentence imposed: 003 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT

MAS-20040909

Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket

11/29/2004
01:08 PM

MICR1994-01511
Commonwealth v Serrano, Edwin

Date	Paper	Text
11/16/1994		OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE Sentence imposed: 004 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT
11/16/1994		OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE. Sentence imposed: 005 - HOUSE OF CORRECTION, TWO YEARS.
11/16/1994		Victim-witness fee assessed: \$50.00
11/16/1994		This sentence is deemed by the Court to have commenced on.....the defendant having been in confinement.....157.....days. Mitts. Issued. By the Court, Charles J. Hely, Justice.
11/16/1994		Sentence imposed: 006 - ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT
11/16/1994		OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE. Sentence imposed: ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT
11/16/1994		OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE. Sentence imposed: ON FILE BY ORDER OF C. HELY, J. DEFENDANT NOT
11/16/1994		OBJECTING THERETO. BY THE COURT, CHARLES J. HELY, JUSTICE.
11/16/1994	6.0	Mittimus returned with service on 005.
11/17/1994		Attested copy of Indictment mailed to the Master of the House of Correction, Billerica.
11/17/1994		Abstract mailed to the Bureau of Criminal Information.

EVENTS

Date	Session	Event	Result
10/17/1994	Crim 6 (Lowell)	Conference: Trial Assignment	
10/21/1994	Crim 6 (Lowell)	Status: Review by Session	Event held as scheduled
11/16/1994	Crim 6 (Lowell)	Hearing: Plea Change	Event held as scheduled

